National Association of Mortgage Brokers

Prepared Testimony of

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Government Affairs

National Association of Mortgage Brokers

on

"The Impact of Financial Regulatory Restructuring on Small Businesses and Community Lenders"

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Good morning Chairwoman Velázquez, Ranking Member Graves, and members of the Committee. I am Mike Anderson, a Certified Residential Mortgage Specialist ("CRMS") and Vice-Chairman of the Government Affairs Committee of the National Association of Mortgage Brokers ("NAMB"). I am also a practicing mortgage broker in the state of Louisiana with over 30 years of experience. Thank you for inviting me to testify today on "The Impact of Financial Regulatory Restructuring on Small Businesses and Community Lenders."

NAMB is the only national trade association that represents the mortgage broker industry. The mortgage broker industry brings greater competition to the market for origination services and often provides consumers with a local alternative to using a large national bank or lender.

Mortgage brokers are typically small businesses, employing between three and fifty employees. They serve both urban and rural communities of every size, and operate in all 50 states and the District of Columbia. Mortgage brokers work with consumers to help them through the complex mortgage origination process, and add value to that process for both consumers and lenders by serving many areas that are typically underserved by banks and other financial institutions. Because many mortgage broker businesses are established and operated exclusively within the communities they serve, they also add value to the process by providing goods, facilities, and services with quantifiable value, including a loyal customer base and goodwill.

NAMB advocates on behalf of more than 70,000 small business mortgage professionals located in all 50 states and the District of Columbia. NAMB also represents the interests of homebuyers, and advocates for public policies that serve mortgage consumers by promoting competition, facilitating homeownership, and ensuring quality service.

NAMB is committed to enhancing consumer protection and promoting the highest degree of professionalism and ethical standards for its members. NAMB requires its members to adhere to a professional code of ethics and best lending practices that fosters integrity, professionalism, and confidentiality when working with consumers. NAMB provides its members with access to professional education opportunities and offers rigorous certification programs to recognize members with the highest levels of professional knowledge and education. NAMB also serves the public directly by sponsoring consumer education programs for current and aspiring homebuyers seeking mortgage loans.

I. Introduction

On June 17, 2009, the Obama Administration released a policy paper through the Department of Treasury entitled "A New Foundation: Rebuilding Financial Supervision and Regulation." In this paper, the Administration outlines a number of proposals aimed at overhauling the structure of our nation's system of financial regulatory oversight, with a special focus on protecting consumers in the market for financial products and services.

The policy paper specifically cites the failure of our current regulatory framework to adequately protect borrowers in mortgage transactions as a critical underlying cause of our financial crisis. The Administration contends that gaps and conflicts of interest have long-existed between state and federal regulators charged with enforcement of consumer protection statutes. The paper goes on to say that consistency and strength of regulation of consumer financial products and services are primary objectives of the Administration's Financial Regulatory Reform Plan ("Administration Plan").

The Administration Plan, as outlined in the Department of Treasury policy paper, focuses on a number of significant issues. Today, our testimony will specifically address issues raised by Section III of the paper which has generally been introduced as H.R. 3126, the "Consumer Financial Protection Agency Act of 2009."

NAMB is generally supportive of the concept behind the Administration's Plan outlined in the Department of Treasury policy paper. NAMB believes that protecting consumers is critically important to rebuilding faith and confidence in our mortgage and financial markets, which has eroded over the past several years. Nevertheless, NAMB feels that any overhaul of the financial regulatory structure must adequately account for the complexity of the modern mortgage market and must endeavor to be non-discriminatory between federal and state chartered entities and focus on clarity to consumers in order to obtain better choices. A reduction in product choices for consumers each consumer situation is unique. Lastly, we believe the most important aspect of a mortgage product is being overlooked; pricing of a product should not be viewed as the ultimate objective. A mortgage with a lower rate is not better if the loan does not close when the consumer requires it to close. In every instance, a consumer cannot have a truck full of their belongings sitting for an extra week while a loan with a "lower rate" gets to the closing table. Service and reliability are factors that cannot be determined by a panel in Washington, DC, only the competitive market place can effectively screen low quality lenders out of the marketplace.

II. Consumer Financial Protection Agency

The Administration's Plan calls for the establishment of a new independent federal regulatory agency called the Consumer Financial Protection Agency ("CFPA"), which is reflected in H.R. 3126. This new agency would become the primary federal regulator focused on consumer protection in the markets for financial products and services.

Under the legislation, the CFPA would be granted rule-making authority for consumer protection under existing statutes, and would possess enforcement and supervisory authority over all persons covered by those statutes.[1] Additionally, the CFPA would be given specific authority to impose greater responsibilities on mortgage lenders, originators, and securitizers. These responsibilities would include: (1) ensuring all communications and disclosures made to consumers are reasonable; (2) offering consumers a "standard" or "plain vanilla" mortgage product option in addition to any other product options available; and (3) exercising a duty of care, possibly among other duties, when working with consumers.

NAMB believes the CFPA, or any other agency for that matter, must act prudently when promulgating and enforcing rules in order to ensure real protections are afforded to consumers, and not merely the illusion of protection that often comes from incomplete or unequal regulation of similar products, services, or providers. Although the CFPA would be given broad powers to regulate and enforce substantive standards for all "consumer financial products or services," today we will focus our testimony on its impact on the small business community, and specifically the mortgage broker industry.

III. How the Mortgage Broker Industry is Currently Regulated

Before delving into the details of the CFPA, it is essential to discuss how mortgage brokers are currently regulated under our existing financial regulatory structure. Since the inception of the mortgage broker industry, brokers have been regulated at both the state and federal levels. Like bankers and other lenders, mortgage brokers comply with every federal fair lending and housing law and regulation affecting the mortgage loan origination industry. Additionally, mortgage brokers comply with a host of state laws and regulations affecting their businesses, from which bankers and lenders are largely exempt.

Mortgage brokers are just one participant in a larger network of loan originating entities – including mortgage bankers, mortgage lenders, credit unions, and depository institutions – all competing to deliver mortgage products to consumers. In today's market, there are actually very few substantive differences between these distribution channels when it comes to originating mortgages. The lines that once divided them have become increasingly blurred with the proliferation of the secondary mortgage market, and more often mortgage brokers and mortgage lenders perform essentially the same function – i.e., they present an array of available loan products to the consumer and close the loan. The lenders, who underwrite and fund the loan, then almost instantaneously sell the loan to the secondary market.

Although mortgage brokers are typically held to higher standards in most states, and consumers often fail to distinguish one origination source from another, brokers stand singularly accused of operating on an unregulated basis. This accusation is plainly false. Mortgage brokers are regulated by more than ten federal laws, five federal enforcement agencies and at least forty-nine state regulation and licensing

[1] The statutes under which the CFPA would be granted authority include the Truth-in-Lending Act ("TILA"), Real Estate Settlement Procedures Act ("RESPA"), Home Ownership & Equity Protection Act ("HOEPA"), Equal Credit Opportunity Act ("ECOA"), Fair Debt Collection Practices Act ("FDCPA"), and Home Mortgage Disclosure Act ("HMDA").

statutes. Moreover, mortgage brokers, who typically operate as small business owners, must also comply with a number of laws and regulations governing the conduct of commercial activity within the states.

a. Federal Regulation of Mortgage Brokers

Mortgage brokers are governed by a host of federal laws and regulations. For example, mortgage brokers must comply with: the Real Estate Settlement Procedures Act ("RESPA"), the Truth in Lending Act ("TILA"), the Home Ownership and Equity Protection Act ("HOEPA"), the Fair Credit Reporting Act ("FCRA"), the Equal Credit Opportunity Act ("ECOA"), the Gramm-Leach-Bliley Act ("GLBA"), and 1 The statutes under which the CFPA would be granted authority include the Truth-in-Lending Act ("TILA"), Real Estate Settlement Procedures Act ("RESPA"), Home Ownership & Equity Protection Act ("HOEPA"), Equal Credit Opportunity Act ("ECOA"), Fair Debt Collection Practices Act ("FDCPA"), and Home Mortgage Disclosure Act ("HMDA"), the Federal Trade Commission Act ("FTC Act"), as well as state and federal fair lending and fair housing laws. Many of these statutes, coupled with their implementing regulations, provide substantive protection to borrowers who seek mortgage financing. These laws impose disclosure requirements on brokers, define high-cost loans, and contain anti-discrimination provisions.

Additionally, mortgage brokers are under the oversight of the Department of Housing and Urban Development (HUD) and the Federal Trade Commission (FTC); and to the extent their promulgated laws apply to mortgage brokers, the Federal Reserve Board, the Internal Revenue Service, and the Department of Labor. These agencies ensure that mortgage brokers comply with the aforementioned federal laws, as well as small business and work-place regulations such as wage, hour and overtime requirements, the do-not-call registry, and can-spam regulations, along with the disclosure and reporting requirements associated with advertising, marketing and compensation for services.

b. Mortgage Broker Regulation in the States

The regulation of mortgage brokers begins at the federal level, but it certainly does not end there. Mortgage brokers are licensed and registered and must comply with pre-licensure and continuing education requirements and criminal background checks in every state pursuant to the Secure & Fair Enforcement for Mortgage Licensing Act of 2008 ("SAFE Act") – a law for which NAMB advocated more than six years before its enactment.

The SAFE Act is designed to enhance consumer protection and reduce fraud by encouraging states to establish minimum standards for the licensing and registration of state-licensed mortgage loan originators and for the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) to establish and maintain a nationwide mortgage licensing system and registry for the residential mortgage. The SAFE Act requires all mortgage originators to adhere to such licensing and registration requirements, with the exception of loan officers at federally chartered institutions.

As small businessmen and women, mortgage brokers must also comply with numerous state anti-predatory lending and consumer protection laws, regulations and ordinances (*i.e.*, UDAP Regulations).

Again, this is not true for a great number of depository banks, mortgage bankers, mortgage lenders and their loan officer employees, which remain exempt from such requirements under federal agency preemption. Many states also subject mortgage brokers to oversight, audit and/or investigation by mortgage regulators, the state's attorney general, or another state agency, and in some instances all three.

To the extent that the CFPA will enhance uniformity in the application of the regulations and laws stated herein that provide for consumer protection, NAMB supports such an objective.

IV. Jurisdiction of the CFPA

The Administration Plan would vest the CFPA with the responsibility of implementing the Truth-in-Lending Act ("TILA"), Home Ownership and Equity Protection Act ("HOEPA"), Real Estate Settlement Procedures Act ("RESPA"), Equal Credit Opportunity Act ("ECOA"); and the Home Mortgage Disclosure Act ("HMDA"), among other statutes. The agency would be granted broad consolidated authority over the functions of rule-writing, supervising and examining regulated entities, and administratively enforcing violations of the statutes it is charged with enforcing.

The CFPA would also be granted authority over all persons covered by the statutes the agency implements, including banks and bank affiliates, non-bank entities, and institutions currently regulated exclusively by one of the federal prudential regulators.

The CFPA's mission would be to help ensure that (1) consumers are provided the information they need to make responsible financial decisions; (2) consumers are protected from abuse, unfairness, deception and discrimination; (3) the markets for consumer financial services operate fairly and efficiently; and (4) traditionally underserved consumers and communities have access to financial products and services.

One fact lost in debates over mortgage policy is the fact that mortgage products are created by very few entities and that products are repackaged and re-branded by many "product" distribution channels. We do appreciate the CFPA's approach of the application of uniform legal standards to all originators so that consumers are free to shop and compare mortgage products and pricing among different distribution channels without fear or confusion. Because each distribution channel is competing for consumers' mortgage loan business, consumers are best served when every mortgage originator is held to the same professional standards under the law. For many years, stronger market competitors have used state and federal mortgage disclosure and other laws to create a competitive advantage over weaker competitors. These actions have only confused consumer understanding of mortgage products.

However, we also believe that there should be some standards in place to prohibit the CFPA from imposing overly prescriptive measures to the detriment of consumers. Ultimately, the CFPA may be regulating in areas that have not been addressed by Congress and therefore, not subject to hearings, oversight or certain checks and balances as provided through the legislative process.

V. Board Makeup

According to the Administration's Plan, "The Agency shall seek to promote transparency, simplicity, fairness, accountability and access in the market for consumer financial products or services." NAMB agrees with such objectives, and before we delve into the particular areas addressing the general powers of the CFPA, we think it is imperative to address the consistency of the CFPA board members.

The Board is established as an "independent" agency within the Executive Branch of the federal government to regulate consumer financial products, services, and service providers. The CFPA would be governed by a board composed of 5 members, one of which will be the director responsible for heading up the merged Office of the Comptroller of Currency (OCC) and the Office of Thrift Supervision (OTS). The other 4 members of the board will be appointed by the President and confirmed by the Senate for staggered terms. One of the Board members will be designated as the chief executive of the CFPA. Unlike other federal agencies which are delegated rulemaking and enforcement authority, such as the Federal Trade Commission and the Securities and Exchange Commission, the CFPA does not impose any requirement that a particular number of board members be from a political party different than the party of the President who appoints them. This raises serious concerns about whether the CFPA can truly function as an independent agency, or whether it could be used as a means for a President to circumvent Congress and legislate without any meaningful checks and balances.

Additionally, because the President may remove any appointed Board member for inefficiency, neglect of duty, or malfeasance in office (which are very subjective terms and undefined in the legislation) the Board's independence may again be called into question. Such criteria for removal would not be concerning if there were bipartisan representation on the board.

In addition to requiring that no more than 3 Board members be of the same political party, we recommend that the Board have proper industry representation and be comprised of individuals who possess business acumen and an understanding of the market for consumer financial products and services.

VI. Fees

The CFPA grants broad authority to impose fees and assessments on "covered persons." NAMB is concerned that those regulated on the state level, such as mortgage brokers, may be forced to pay more to do business, which will place such entities at a competitive disadvantage and will ultimately increase costs for consumers.

Additionally, there is absolutely no limitation on the fees charged and the legislation does not correlate the fees with a covered person's business size or transaction engagement.

VII. Exemptions

The purpose of the agency is to promote transparency, simplicity, fairness, accountability, and access in the market for consumer financial products or services, and to ensure the markets for consumer financial products and services operate "fairly and efficiently" with "ample room for growth and innovation." However, the bill specifically allows for exemptions for any covered person, product or service that meets specified criteria, which small business professionals are not likely to meet. If the CFPA's mission is to truly create uniformity of all products and services and protect consumers regardless of where they shop, providing for exemptions is contrary to such a goal. There should be no exemptions or a tiered form of exemptions, *i.e.*, very large covered persons, those covered persons that provide de minimis services and products.

VIII. Directive to Review Existing Regulations

As was clearly stated in the Administration's policy paper, the financial regulatory reform effort is not about more regulation. It is about better regulation. The Administration Plan would require the CFPA to complete comprehensive regulatory studies of every new regulation that is enacted, in order to assess the effectiveness of such regulation in meeting its stated purposes and goals. Additionally, the CFPA would be directed to review existing regulations for similar purposes.

NAMB strongly supports empowering the CFPA to undertake a comprehensive review of new and existing regulations. Too often, in the wake of our current financial crisis, we have seen new rules promulgated that do not reflect measured, balanced solutions to the problems facing consumers and our markets. The Home Valuation Code of Conduct ("HVCC") provides one such example.

The HVCC is the result of a joint agreement reached in March 2008 between Fannie Mae, Freddie Mac (together, the "GSEs"), the Federal Housing Finance Agency ("FHFA"), and New York Attorney

General, Andrew Cuomo. The HVCC purports to enhance the independence and accuracy of the appraisal process. However, what the HVCC truly accomplishes is an increase in consumer costs, a decline in appraisal quality, the extension of closing deadlines, and the virtual extinction of local small business appraisers.

The HVCC is a substantive rule that affects consumers and regulates mortgage and appraisal professionals in all 50 states. Yet, the HVCC was promulgated by an agency – the FHFA – charged with ensuring safety and soundness and promoting a stable and liquid mortgage market, which clearly falls outside of the HVCC's purpose and objective. Moreover, the HVCC was drafted, revised, and implemented by the FHFA outside of the federal rule-making procedures required under the Administrative Procedures Act ("APA").

NAMB believes it is important to strengthen the integrity and independence of the home appraisal process, as appraisal independence is essential to protecting consumers from fraud and from unscrupulous actors. However, NAMB does not believe the FHFA acted in the best interests of consumers when promulgating the HVCC and NAMB does not believe the FHFA should be instituting measures that would more properly fall under the authority of an agency like the CFPA.

NAMB strongly supports H.R. 3044, the legislation introduced by Rep. Travis Childers and Rep. Gary Miller to impose an 18-month moratorium on the HVCC. NAMB commends Representatives Childers and Miller for their leadership on this issue and we thank the members of this Committee who have agreed to co-sponsor this important piece of legislation. We urge this Committee to direct the FHFA to withdraw the HVCC immediately, and to empower the CFPA with the authority to undertake rule-writing that more appropriately regulates appraisal activities, ensures appraisal independence, and protects consumers.

Additionally, NAMB believes that H.R. 3126 should be amended to specifically preempt any state statute from having any force or effect where the CFPA or a similar federal agency is vested with authority under any federal statute to provide similar protection to consumers that the state statute provides. The Consumer Product Safety Act[2] preempts any state from establishing or continuing any safety standard designed to deal with the same risk of injury as a federal standard, unless it is identical to the federal standard. H.R. 3126 should similarly restrict the potential establishment of 50 different consumer protection standards in addition to those promulgated by the CFPA.

The impetus behind the ill-conceived HVCC was the use of an extremely broad and controversial state statute to investigate possible financial fraud at a large lending institution in the state of New York. As this investigation unfolded, the New York Attorney General utilized his virtually boundless authority under the statute to expand his investigation into certain activities at the GSEs. Although the HVCC is a substantive rule, ultimately promulgated by a federal agency – the FHFA – it stems directly from the New York Attorney General's use of the highly controversial Martin Act[3], which vests unprecedented investigatory and prosecutorial powers with a single State Attorney General.

Specifically, New York's Martin Act grants the Attorney General the power to subpoena virtually any document from any individual or entity doing business in the state of New York. The Martin Act also permits the New York Attorney General to commence an investigation whenever he believes it is in the public interest that an investigation be made, or whenever it appears any person has engaged in fraudulent practices. Moreover, once an investigation has been initiated under this Act, the New York Attorney General is relieved of any obligation to demonstrate probable cause or to disclose the details of the

[2] 5 U.S.C. 2051, et. seq.
[3] 1N.Y. GEN. BUS. LAW, Art. 23-A, § 352 et seq.

investigation. Additionally, anyone brought in for questioning during a Martin Act investigation does not have a right to counsel or a right against self-incrimination, and the Attorney General may prevail in a case without proving there was any intent to defraud, that anyone was actually defrauded, or even that a transaction actually took place.

The Martin Act in New York is the paramount example of state regulation already in existence that runs afoul of the purposes and objectives behind establishing the CFPA. NAMB strongly believes H.R. 3126 should preempt the Martin Act, as well as any other current or subsequently enacted statutes having the same force and effect in other states.

IX. Creation of an Outside Advisory Panel

NAMB supports the proposal in the Administration's Plan to create an outside advisory panel, akin to the Federal Reserve Board's Consumer Advisory Council, to encourage accountability on the part of the CFPA and allow for the useful sharing of information regarding emerging industry practices. NAMB believes such a panel must be comprised of enough members to fairly represent all segments of the industry, as well as consumers, and NAMB would welcome an opportunity to participate on such a panel. However, clarification is required as to the makeup of the Consumer Advisory Board, specifically with regard to how large it will be and what "a full time employee of the United States" actually means.

X. Administration of the S.A.F.E. Act

NAMB believes that the Secure & Fair Enforcement for Mortgage Licensing Act of 2008 ("SAFE Act") should be amended to ensure that the CFPA possesses complete and exclusive authority to implement the entire Act, including oversight of the operations of the registry created by the Act. Transferring total administrative authority over the SAFE Act to the CFPA will eliminate any potential gaps in coverage, where lesser standards and/or the exemption or insulation of a certain class or group of individuals who originate loans may persist. This will also eliminate the seemingly conflicting language in H.R. 3126 that encourages states to apply standards to non-depository and credit union covered persons, including background checks, education requirements, registration, etc.

NAMB strongly supports making the CFPA the sole federal agency responsible for administering the SAFE Act. Authority to administer the SAFE Act is currently divided among several federal agencies, and NAMB believes consumers would benefit greatly from having unified authority vested in a single federal regulator responsible for overseeing the implementation and administration of the SAFE Act.

To help illustrate this point, one need not look further than the recently published "proposed rules" to implement the SAFE Act, issued jointly by the federal banking agencies – the Office of the Comptroller of the Currency; Federal Reserve Board; Federal Deposit Insurance Corporation; Office of Thrift Supervision; and National Credit Union Administration. The failure of these agencies to properly emphasize and implement important consumer protection measures set forth in the SAFE Act highlights one of the fatal flaws in a fragmented approach to regulatory oversight of consumer protection measures, like the SAFE Act.

In these proposed rules, the five federal banking agencies seek to implement only the bare minimum requirements for consumer protection set forth in the SAFE Act with respect to agency-regulated institutions. Moreover, the agencies seek to delay any implementation of the SAFE Act's consumer protection requirements for agency-regulated institutions for at least 180 days from the time the agencies announce that the national registry is actively accepting initial registrations. Lastly, these agencies have proposed exemptions to SAFE Act requirements for some of their employees.

NAMB believes responsibility for implementing the SAFE Act should be vested exclusively with a single federal regulator focused on consumer protection, like the CFPA. Additionally, NAMB believes in keeping with the broad authority granted to the CFPA under the Administration's Plan, that the CFPA should undertake comprehensive rulemaking to extend and implement the most critical consumer protections included in the SAFE Act – namely, the education and testing requirements – so that all loan originators are held to the same high standards, including those who are employees of federally-regulated institutions.

While states are now required under the SAFE Act to increase standards for state-licensed mortgage originators, employees of federally-regulated institutions continue to escape requirements that they meet important benchmarks for training, continuing education, and proficiency testing. Today most consumers are unable to distinguish one mortgage originator from another (i.e., a state-licensed mortgage originator vs. a loan officer employee of a federally-regulated institution), so why should some of our most important consumer protection regulations make such a distinction?

NAMB strongly believes that even more can and should be done to increase professional standards for all mortgage originators. Great strides were made with the passage of the SAFE Act in 2008. However, even in passing the SAFE Act, there remain cracks in our consumer protection regulatory framework where loan originators employed by certain entities or institutions must meet more rigorous standards than loan originators at other institutions.

Today NAMB is advocating for an extension of the consumer protection requirements set forth in the SAFE Act so that all mortgage originators, including employees of federally regulated banks and other institutions are required to satisfy the same education and testing requirements.

XI. Consumer Education & Financial Literacy

NAMB supports the CFPA playing a leading role in efforts to educate consumers about financial matters, improve consumers' ability to manage their own financial affairs, and make proper judgments about the subjective appropriateness of certain financial products.

NAMB believes that consumers are, and should remain, the ultimate decision-maker when it comes to the product, pricing, and service offered in connection with a financial transaction. Therefore, it is imperative that consumers possess the necessary financial knowledge to carefully evaluate the risks and rewards presented by different financial products and be able to determine the appropriateness of such products for their particular needs.

In the context of mortgage transactions, regardless of how knowledgeable a loan originator is or becomes, an educated consumer is always in a better position to make an informed decision when selecting a mortgage product to match his or her financial needs and goals.

NAMB has always been a strong advocate for consumer financial literacy efforts. It is our firm belief that an educated borrower is significantly less likely to fall victim to any abusive lending practices, and that is why we support the Administration's proposal to make consumer education and financial literacy a key component of the larger financial regulatory reform effort. We urge Congress to require the CFPA to utilize modern testing of forms and consumer choice science to formulate modern mortgage disclosure forms. We believe this is a cornerstone of financial literacy. Disclosures that confuse consumers lead to incorrect choices and open the door for unscrupulous actors to take advantage of the consumer.

XII. Specific Consumer Protection Reforms

The Administration's Plan calls for a series of legislative, regulatory and administrative actions to reform consumer protections, based upon the principles of transparency, simplicity, fairness, accountability and access.

Although NAMB welcomes transparency across the entire mortgage market, NAMB would caution the CFPA, or any such regulator, against potentially causing unintended harm to consumers in the process of revising disclosures and attempting to simplify what has become a very complex mortgage process. NAMB strongly believes that any effort to improve simplicity and fairness in mortgage transactions must respect the complexity of today's market and emphasize transparency at each stage in the lifecycle of a loan – from origination through sale or securitization.

No single aspect of a mortgage transaction should be examined in a vacuum. While transparency is critical at origination, if it exists there alone it is meaningless and confusing to consumers. There must also be transparency in the processes extending beyond origination but affecting the products and prices available to consumers.

To the extent the Administration's Plan and this Committee endeavor to improve transparency, simplicity, and fairness at origination and throughout the entire life cycle of a mortgage, NAMB is very supportive.

a. Transparency – Balanced, Clear, Concise & Consumer-Tested Disclosures

The Administration's Plan calls for mandatory disclosure forms that are simple, clear, concise and consumer-tested. NAMB generally supports greater transparency in consumer financial transactions, and is very supportive of efforts to simplify, clarify and effectively consumer-test all mandatory disclosure forms. Many current disclosures have failed to keep pace with market innovations and increasing transaction complexity. At the same time, recent efforts to revise antiquated disclosure forms, such as the Goof Faith Estimate, have failed to demonstrate their effectiveness through consumer testing.

NAMB is very supportive of the concept in H.R. 3126 to require a model disclosures that combine the disclosures required under TILA and RESPA into a single, integrated disclosure for mortgage loan transactions. Consumers will greatly benefit from a single, integrated and uniform federal mortgage disclosure form which clearly and simply discloses critical loan terms and costs.

Additionally, NAMB strongly encourages this Committee to consider imposing a moratorium on the implementation of any new regulations or disclosure forms issued by HUD and FED for at least 1 year after the designated transfer date. This will help avoid consumer confusion and minimize the increased costs and unnecessary administrative burden borne by industry participants if multiple significant changes are made to mandatory disclosure forms over a short period of time.

The Administration's Plan and H.R. 3126 seek to provide consumers with disclosures that help them to understand the consequences of their financial decisions. NAMB strongly supports this goal and has long-advocated for clear, consistent, and uniform communication with consumers from the shopping stage through closing, and afterwards throughout the life of the loan (i.e., through monthly statements).

Regardless of the form that a consumer disclosure takes, there are certain essential elements that NAMB believes must be included in order for the form to effectively aid consumers in making appropriate financial decisions. First, an effective consumer disclosure must be even-handed. The disclosure must be uniform and equally applicable to all individuals and entities engaged in the activity being regulated through disclosure. Second, an effective consumer disclosure must be informative. Consumers must be provided clear statements of fact concerning the roles of the parties to the transaction, as well as a clear breakdown of estimated costs or other critical information associated with the transaction. Third, an effective disclosure must be proven effective. Disclosures must be consumer-tested in real-life situations and objectively evaluated to determine whether they are in fact communicating the proper information to consumers and are doing so in a clear and concise manner.

Moreover, NAMB believes all agencies and any future ones be required to consumer-test all current disclosure forms, as well as any new disclosure forms aimed at helping consumers understand financial products and services better. This testing should focus on the disclosure's effectiveness in communicating critical information to the consumer, as well as any potential negative affects that the disclosure could have on competition between market participants.

Finally, as the Administration's policy paper correctly points out, regulators are typically limited to testing disclosures in a "laboratory" environment, which can skew results and lead to the widespread implementation of an ineffective disclosure form. Field-testing can, and often does, produce more accurate results and more useful feedback. NAMB supports the provisions of the Administration's Plan that call for the establishment of standards and procedures for effectively conducting field tests of consumer disclosures before they are implemented and required across the board.

b. Simplicity – "Plain Vanilla" Mortgage Products

The legislation mandates that rules requiring a covered person to offer a "standard consumer product or service" at the same time or before it offers an "alternative consumer product or service." It also authorizes the CFPA to adopt rules regarding the offer of standard and alternative consumer products and services including warnings about the heightened risks of alternative consumer products and services and rules requiring that consumers be provided a "meaningful" opportunity to decline to obtain the standard consumer financial product or service.

The term the Administration's Plan uses to describe these less risky, simpler products is "plain vanilla." In the context of mortgages, "plain vanilla" products would have either fixed or adjustable rates, predictable payments, mandatory escrows for taxes and insurance, and no prepayment penalties attached. The idea behind these "plain vanilla" products is that they could be compared and differentiated by a single, simple characteristic, i.e., the interest rate.

NAMB is supportive of efforts to simplify the process of obtaining a mortgage. However NAMB is concerned that efforts to simplify and standardize mortgage products could have serious negative consequences for consumers looking to find the most appropriate and cost effective loan for their situation. Specifically, NAMB is worried about the unnecessary additional costs of developing new products, questionnaires, and opt-in disclosures that would likely be passed-on to consumers if institutions' product offerings are overregulated. Additionally, NAMB is concerned that consumers may fall into the trap of merely opting for the "plain vanilla" mortgage product, regardless of its appropriateness for their particular situation, simply because it appears to be preferred and may falsely be interpreted as a "government approved" product. NAMB is not supportive of the "plain vanilla" concept.

c. Fairness – Duties Owed to Consumers by Originators & Entities

H.R. 3126 imposes duties on covered persons and their agents and employees to ensure fair dealing with consumers in financial transactions. Such rules may establish duties regarding compensation practices, but specifically prohibit the CFPA from capping the amount of compensation paid to any person.

NAMB has some concerns about this broad power without any rules of construction to ensure that there is no disparate treatment among industry participants. NAMB is concerned about the CFPA's ability to remove consumer financing options and we believe that the CFPA should be provided with some specific rules of construction in interpreting this section.

NAMB does, however, appreciate the importance of ensuring that loan originators are not incentivized to steer consumers into particular loan products purely for personal gain, and NAMB is very supportive of efforts to eliminate any such incentives from the marketplace. Therefore, NAMB commends the Administration's Plan for recognizing and proposing affirmative steps be taken to require banks and lenders to disclose to consumers the payments made to their employees called "overages," as well as their "service release premiums."

NAMB supports those provisions in the Administration's Plan that call for all originators, including banks and non-depository lenders, to disclose all direct and indirect income generated in a mortgage transaction, as mortgage brokers have done since 1992. In fact, NAMB advocates for utilizing the mortgage broker model of complete financial disclosure to effectively reveal the heretofore hidden bank payments to loan officers and service release premiums.

Although not in the bill, included in the Administration's Plan is the CFPA's authority to require loan originator compensation to be tied to loan performance and paid-out over the life of a loan, as opposed to in one lump sum upon origination.

NAMB sees a number of specific practical flaws in the Administration's Plan to propose regulations linking loan originator compensation with the longer-term performance of a loan. Loan originators earn their compensation when they successfully match a loan product with a customer's individual needs and desires for home financing and are involved in that transaction through to closing. Additionally, lenders create mortgage products, determine the type of risk they are looking for and price that risk accordingly.

i. Standards of Care

The Administration's Plan also proposes granting the CFPA the authority to impose certain duties of care on the providers of financial products and services. In prescribing such regulations, the CFPA shall consider whether (1) the covered person is acting in the interest of the consumer with respect to any aspect of the transaction; (2) the covered person provides the consumer with advice; (3) the consumer's reliance on any advice from the covered person would be reasonable and justifiable under the circumstances; (4) the benefit to the consumers of imposing a duty would outweigh the costs; and (5) any other factors the CFPA deems appropriate.

Since 2002, NAMB has advocated for more stringent standards for all loan originators to protect consumers and curb abusive lending practices in the mortgage industry. However, NAMB cautions the CFPA, or any regulator attempting to implement a standard of care for mortgage originators, that there is a likelihood of unintended negative consequences for consumers if such a standard is overly restrictive or under-inclusive of essential market participants.

NAMB believes that a standard of care should apply whenever a person is acting as a loan originator under the definition in the SAFE Act, and should be broad and flexible enough to operate as a ceiling, not a floor, in establishing a loan originator's responsibilities when working with consumers. Also, because the acts of originating, funding, selling, servicing, and securitizing mortgage loans may all be conducted separately and independently, or may be engaged in collectively under one corporate structure or through affiliated business arrangements, it is important for consumer protections to relate to the function, as opposed to the structure of entities. In the end, consumers deserve the same level of protection no matter where they choose to obtain a mortgage loan.

Specifically, NAMB believes that any person required to be licensed or registered as a loan originator under the SAFE Act should have a federal statutory duty to exercise good faith and fair dealing in all communications and transactions with consumers. All loan originators should be held to the same standard of conduct toward consumers so that all consumers are shielded from the potentially grave consequences that can occur when transacting business with under-qualified individuals, regardless of whether they are working with a federally-chartered bank, state-chartered lender, credit union, or mortgage broker. In addition, if the CFPA requires disclosure or duties on any particular mortgage provider, the CFPA should require disclosures to be symmetrical. Meaning, those with no duty to the consumer must disclose that fact to their customer.

ii. Consistent Regulation of Similar Products, Services & Providers

NAMB strongly supports the Administration's emphasis on fairness and the preservation of effective competition on our financial markets throughout its policy paper. We agree entirely with the Administration that similar disclosures for similar products, services, and providers enables consumers to make more informed choices based upon a full appreciation of the nature and risks involved in a given transaction.

We do not deny that differences exist between depository and non-depository institutions, both in terms of their business models and how they are currently regulated. However, when it comes to the contact with consumers in the context of mortgage loan origination, these entities are virtually indistinguishable, particularly in the eyes of consumers, and therefore should be regulated by a single federal agency and held to the same standards as their competitors.

XIII. Conclusion

NAMB greatly appreciates the opportunity to discuss "The Impact of Financial Regulatory Restructuring on Small Businesses and Community Lenders" with this Committee. Although we generally support many of the consumer protection measures outlined in the Administration's Plan, we do have concerns over certain specific elements of the proposal as they may have a disproportionate and profoundly negative impact on all small businesses, and particularly mortgage brokers.

Mortgage brokers and other small business originators have already suffered a tremendous loss of market share in the wake of the financial crisis and subsequent government-backing of larger institutions. In fact, during the first half of 2009, 52% of all mortgage originations were handled by three federal depositories.[4]

We are deeply concerned that without adequate accounting for the interests of small businesses in any proposed financial regulatory restructuring, competition will further erode, small businesses will become extinct, and consumers will suffer the consequences of a mortgage and financial market controlled by a corporate oligarchy.

Thank you again for inviting NAMB to appear before this Committee and discuss these very important issues affecting both small businesses and the consumers they serve.

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[4] Peter Eavis, *Uncle Sam Bets the House on Mortgages*, WALL ST. J., September 18, 2009 (see attached).